

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-1376

To be argued by
RONALD L. GARNETT

B
P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1376

UNITED STATES OF AMERICA,
Appellant,

—v.—

DOMINIC TORTORELLO,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

THOMAS J. CAHILL,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

RONALD L. GARNETT,
JAMES A. MOSS,
JOHN D. GORDAN, III,
*Assistant United States Attorneys,
of Counsel.*

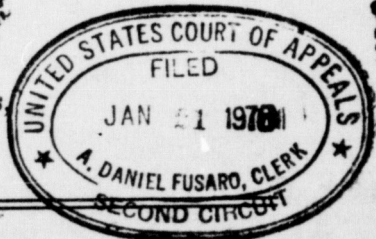




TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	3
A. The search at 2258 Hermany Avenue	3
B. Standing of Dominic Tortorello with respect to the premises at 2258 Hermany Avenue ..	5
C. The Memorandum Opinion and Order of the District Court, filed November 14, 1975 ...	6
ARGUMENT:	
The order of suppression as to defendant Tor- torello should be reversed	7
CONCLUSION	10

TABLE OF CASES

<i>Brown v. United States</i> , 411 U.S. 223 (1973)	7, 8
<i>Dearinger v. Rhay</i> , 421 F.2d 1086 (9th Cir. 1970) ..	8
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973) ...	9
<i>United States v. Beigel</i> , 370 F.2d 751 (2d Cir.), <i>cert. denied</i> , 387 U.S. 930 (1967)	8
<i>United States v. Bozza</i> , 365 F.2d 206 (2d Cir. 1966)	8
<i>United States v. Capra</i> , 501 F.2d 267 (2d Cir. 1974), <i>cert. denied</i> , 420 U.S. 990 (1975)	7
<i>United States v. Faruolo</i> , 506 F.2d 490 (2d Cir. 1974)	9
<i>United States v. Hearn</i> , 496 F.2d 236 (6th Cir.), <i>cert. denied</i> , 419 U.S. 1048 (1974)	8

	PAGE
<i>United States v. Hunt</i> , 505 F.2d 931 (5th Cir. 1974)	8
<i>United States v. Lisk</i> , 522 F.2d 228 (7th Cir. 1975)	8, 9
<i>United States v. Miley</i> , 513 F.2d 1191 (2d Cir. 1975)	9
<i>United States v. Re</i> , 372 F.2d 641 (2d Cir.), <i>cert. denied</i> , 388 U.S. 912 (1967)	8
<i>United States v. Wright</i> , 524 F.2d 1100 (2d Cir. 1975)	8
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963)	8

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1376

UNITED STATES OF AMERICA,

Appellant,

—v.—

DOMINIC TORTORELLO,

Defendant-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The United States appeals from an order of the Honorable Lloyd F. MacMahon, United States District Judge, entered in the United States District Court for the Southern District of New York on September 3, 1975, suppressing certain stolen coffee and statements of the defendant Dominic Tortorello as evidence against him at trial.

Indictment 75 Cr. 730, filed July 23, 1975, charged in one count that on April 23, 1973, defendants Frank Hoffman and Dominic Tortorello received 250 cartons of stolen coffee, worth more than \$5,000, moving in interstate commerce. Title 18, United States Code, Section 2315 (155a).*

* Page references followed by "a" refer to the Government's appendix on appeal.

On August 14, 1975, Hoffman and Tortorello moved to suppress certain statements made by them; 50 cartons of the stolen coffee found in a van they were driving when they were stopped by the New York City Police on April 25, 1973; 50 additional cartons of the stolen coffee found on April 30, 1973, by FBI agents in a garage adjacent to a dwelling at 2258 Hermany Avenue in the Bronx; and an additional 250 cartons of the stolen coffee discovered the same day by the agents in the basement of the Hermany Avenue house.*

An evidentiary hearing on the motion was held on August 26, 1975. On August 27, Judge MacMahon announced from the bench that the search of the garage and the basement at 2258 Hermany Avenue had been illegal and that the coffee so discovered and any statements taken then or thereafter would be suppressed (131a-132a). An order with brief memorandum opinion embodying this action was filed and entered on September 3, 1975 (134a).

On October 2, 1975, the Government moved to re-argue the motion as to Tortorello on the ground that he lacked standing to complain of the search of the garage at Hermany Avenue, the illegality of which was the sole basis for the suppression of the coffee later found in the basement and of Tortorello's subsequent statements.

On October 3, 1975, the Government filed a notice of appeal from Judge MacMahon's order of September 3.

On November 14, 1975, Judge MacMahon filed a lengthy memorandum opinion and order denying the

* The 250 cases of coffee found in the basement constitute the subject matter of the indictment. The indictment does not charge the 50 cases of coffee found in the van in Brooklyn by the police on April 25, 1973, nor the 50 cases found in the garage by the FBI agents on April 30, 1973.

motion for reargument as untimely and setting forth his findings of fact and conclusions of law underlying the order of suppression (135a-154a). The Court specifically agreed with the Government's argument that Tortorello lacked standing to complain of the search of the garage and held also that, as a consequence, the coffee thereafter found in the basement was admissible against him, as were his subsequent statements. However, because of the procedural posture of the case, Judge MacMahon concluded that "the Court of Appeals is the only proper tribunal to pass upon the correctness of our original decision."

On January 13, 1975, this Court granted the Government's motion for dismissal of its appeal as to Hoffman. The Court denied the Government's application for summary reversal of the District Court's order as to Tortorello and fixed an expedited schedule for the appeal.

Statement of Facts

The indictment charged that defendants Hoffman and Tortorello received, on April 23, 1973,* 250 cartons of stolen coffee moving in interstate commerce.

The facts elicited from the testimony at the suppression hearing are as follows.

A. The search at 2258 Hermany Avenue

On April 25, 1973, Hoffman and Tortorello were apprehended in Brooklyn by New York City police officers while driving a van containing some 50 cartons of stolen coffee (3a-15a, 57a-60a, 75a-78a).

* This was one week prior to the search at issue.

On the morning of April 30, 1973, FBI Agent Lester Hay and three other agents, without search or arrest warrants, went to 2258 Hermany Avenue in the Bronx. At that location is a two family house with a single entrance; defendant Hoffman resides on the first floor with his wife and one child, and Hoffman's parents-in-law, who are also the parents of defendant Dominic Tortorello, reside on the second floor with one daughter (63a-64a, 79a-80a, 95a-96a). At the back of the house is a detached three-car garage connected to the street by a driveway (28a-29a, 49a).

As Agent Hay approached the front door, other agents walked down the driveway to the back of the house and looked into the garage through a window. They observed some fifty cartons of stolen coffee and communicated their discovery to Hay (47a-48a). Hay then met with Hoffman, advised him of what had been seen in the garage, and obtained permission to conduct a search of Hoffman's residence on the first floor of the house, which turned up nothing (26a-28a, 46a, 72a). The agents and Hoffman then went to the garage, and the agents entered and examined the cases of stolen coffee (28a). Hay asked Hoffman for permission to search the second floor of the house, but Hoffman refused, saying that it would upset his parents-in-law, who were ill (29a). The agents asked to search the basement, but this Hoffman also refused on the ground that he had no authority to allow such a search (29a, 40a-42a). At the agents' request Mrs. Hoffman telephoned defendant Dominic Tortorello, her brother, who arrived at the house some fifteen minutes later (97a-98a). After advising him of his rights and receiving a written waiver, Hay and two other agents had a conversation with Tortorello in their car about the stolen coffee, including their discovery in the garage (30a-31a, 49a-50a; GX 6). The agents then requested that he permit a search of the basement, advising him that he had the

right to refuse, and Tortorello executed a written consent to search form (31a-32a; GX 8). The agents were then taken to the basement by Tortorello and found the 250 cases of stolen coffee which are the subject of the indictment (32a).

B. Standing of Dominic Tortorello with respect to the premises at 2258 Hermany Avenue.

As noted above, 2258 Hermany Avenue is a two family home occupied on its first floor by the defendant Hoffman, his wife and child, and on the second floor by Mr. and Mrs. Dominic John Tortorello, the parents of defendant Dominic Tortorello and of the wife of defendant Hoffman, and their daughter. Behind the house is a three car garage, from which a driveway runs to the street.

According to the testimony of the defendant Dominic Tortorello, who lives at 1960 East Tremont Avenue in the Bronx, the residence at 2258 Hermany Avenue has been owned by his father for the past nineteen years (74a, 79a, 90a-91a). Dominic Tortorello resided at Hermany Avenue until August, 1972, some eight months before the search, moving out at the time of his marriage (91a). Tortorello testified that he surrendered his key to the house the day he moved out and is required to knock to gain admittance (91a-92a). Tortorello was specifically asked by his counsel whether "you have any interest whatsoever in that home on Hermany Avenue" and answered in the negative (87a).

Dominic Tortorello made no claim whatsoever of any interest in, use of or access to the garage at the back of the house, the property surrounding it, or the coffee found in it. The only testimony by either defendant about the garage was that of Hoffman, who said that the garage belonged to his father-in-law and that, al-

though Hoffman had a car, he kept it in the street (63a). On cross-examination Hoffman added the following:

"Q. I direct your attention to the garage of that house at 2258 Hermany. Do you store things in that garage? A. No, I don't.

Q. You have no access to that garage? A. No, I do not.

Q. You don't go into that garage at all? A. Maybe once in a while but I do not store anything in it, no.

Q. You have access to it once in a while? A. If I felt like it, yes" (69a).

Finally, as the statement of facts reveals, Tortorello was not present at 2258 Hermany Avenue when the stolen coffee was located in the garage. He was present when the cellar was searched, but this search occurred only after Tortorello had voluntarily given the agents his written consent to the search.*

C. The Memorandum Opinion and Order of the District Court, filed November 14, 1975.

With respect to the search of the garage and basement at 2258 Hermany Avenue, the District Court held that the agents had acted unreasonably in going to the rear of the house and looking into the garage when they first arrived at 2258 Hermany Avenue. He held that Hoffman had standing to object to this search because the agents trespassed on the curtilage of the dwelling where Hoffman resided in order to reach the garage,

* In addition, the indictment does not charge Tortorello with possession of the stolen coffee in the garage, still less with its possession on the day of the search.

and that, as to Hoffman, the unlawful discovery of the coffee in the garage tainted both the agents' later entry into the garage and search of the basement. However, the District Court found that Tortorello lacked standing to complain of the search of the garage and the trespass preceding it, that his consent to the search of the cellar was voluntarily given, and that neither the coffee nor his statements should have been suppressed.

ARGUMENT

The order of suppression as to defendant Tortorello should be reversed.

As even the District Court itself ultimately concluded, the Government respectfully submits that it is clear the order of suppression as to Tortorello was erroneous.

The ground for the September 3, 1975 suppression order was that the illegal search of the garage at 2258 Hermany Avenue and its fruits unlawfully tainted Tortorello's consent to search the cellar of the house at that same address. However, in his memorandum opinion of November 14, 1975, Judge MacMahon recognized that Tortorello, whose consent to the search of the basement was held to be voluntary, lacked standing to assert that the search of the cellar was tainted by the illegality surrounding the search of the garage because, as to the latter, he "(a) [was] not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) [was] not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Brown v. United States*, 411 U.S. 223, 229 (1973). See also *United States v. Capra*, 501 F.2d

267, 272 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States v. Hearn*, 496 F.2d 236, 240-41 (6th Cir.), *cert. denied*, 419 U.S. 1048 (1974).*

Absent standing to assert the illegality of the search of the garage, it is clear that Tortorello may not claim that its fruits tainted his consent to the search of the basement. A defendant may not challenge the admission of evidence against him on the ground that it was obtained by exploitation of a violation of a third party's rights, *United States v. Wright*, 524 F.2d 1100, 1102 (2d Cir. 1975); *United States v. Lisk*, 522 F.2d 228 (7th Cir. 1975) (Stevens, C.J.); *Dearinger v. Rhay*, 421 F.2d 1086, 1087-1088 (9th Cir. 1970), and this is so even when the aggrieved third party is joined as a co-defendant. *Wong Sun v. United States*, 371 U.S. 471 (1963); *United States v. Re*, 372 F.2d 641, 643-644 (2d Cir.), *cert. denied*, 388 U.S. 912 (1967); *United States v. Beigel*, 370 F.2d 751, 756 (2d Cir.), *cert. denied*, 387 U.S. 930 (1967); *United States v. Bozza*, 365 F.2d 206, 223 (2d Cir. 1966); *United States v. Hearn*, *supra*; *Dearinger v. Rhay*, *supra*.

Thus, as Judge MacMahon ultimately found, although defendant Hoffman could successfully contest the unlawful search of the garage, Tortorello—who claimed no interest whatsoever in the premises or the coffee, was not present during the agents' trespass and search of the garage, and was not charged with possession of the coffee in the garage, or, indeed, with possession of *any* of the stolen coffee on April 25 or 30, when it was uncovered by the police and the FBI—may not. Lacking this standing, it necessarily follows that Tortorello's

* Nor does Tortorello claim any legitimate interest in the stolen coffee found in the garage. *Brown v. United States*, *supra*. See generally *United States v. Hunt*, 505 F.2d 931, 939-40 (5th Cir. 1974).

knowledge of what evidence the search of the garage had uncovered cannot vitiate his consent to the search of the basement, which Judge MacMahon correctly concluded was voluntarily given. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *United States v. Miley*, 513 F.2d 1191, 1201-1205 (2d Cir. 1975); *United States v. Faruolo*, 506 F.2d 490 (2d Cir. 1974). Accordingly, Tortorello may not on this ground seek to suppress the fruits of a search he freely consented to.

A final word is warranted with regard to the Government's disarray in the District Court. There can be no question that the Government failed to claim lack of standing as to Tortorello until its motion for reargument. However, we respectfully submit that since the Government took a timely appeal from the order of suppression and did raise the question of Tortorello's standing on the motion for reargument, which Tortorello did not oppose, its failure to raise the issue initially does not foreclose the claim made here. See *United States v. Lisk*, *supra*, 522 F.2d at 231 n. 8.*

* In his opinion of November 14, Judge MacMahon stated that the Government had conceded Tortorello's standing (145a). We did not so intend. Indeed, the only reference to standing in the Government's papers below which might be so construed appears in the Government's second memorandum of law, in which it countered an argument by *Hoffman* that he lacked authority to consent to the search of the garage with the rejoinder that he had such authority because he had standing to assert the illegality of its search.

CONCLUSION

The order of suppression as to Tortorello should be reversed.

Respectfully submitted,

THOMAS J. CAHILL,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

RONALD L. GARNETT,
JAMES A. MOSS,
JOHN D. GORDAN, III,
*Assistant United States Attorneys,
of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JOHN D. GORDAN, III, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 21st day of January, 1976,
he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Irving Anolik, Esq.
225 Broadway
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mailbox for mailing at the United States Courthouse Annex, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

John D. Gordan III

Sworn to before me this

21st day of January, 1976.

Jeanette Ann Grayeb
JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-154175
Qualified in Kings County
Commission Expires March 30, 1977